Filed 12/27/04 Gunderson v. Republic Industries CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

SCOTT GUNDERSON, Plaintiff and Appellant, v. REPUBLIC INDUSTRIES, et al., Defendants and Respondents.	B170784 (Los Angeles County Super. Ct. No. BC289946)

APPEAL from a judgment of the Superior Court of Los Angeles County. J. Stephen Czuleger, Judge. Reversed and remanded.

D. Wayne Leech for Plaintiff and Appellant.

Drosman, Abney & Percival and Michael L. Abney; Williams & Connolly, Daniel F. Katz and Stephen D. Andrews for Defendants and Respondents.

SUMMARY

According to the plaintiff's complaint, in connection with the sale of two car dealerships, the parties entered into an agreement allowing the defendant to use the plaintiff's trade name within a specified geographic region for a three-year period. The plaintiff retained the right to use the name outside the area surrounding the dealerships during the three-year period and without restriction thereafter. The defendant engaged in highly publicized criminal conduct during the three-year use period destroying the value of the trade name. Because we conclude that these allegations sufficiently state a cause of action for breach of the implied covenant of good faith and fair dealing, we find that the trial court erred in sustained the defendant's demurrer without leave to amend and reverse.

FACTUAL AND PROCEDURAL SYNOPSIS[1]

Scott Gunderson has owned and operated Southern California automobile dealerships bearing his name. He was a shareholder in Gunderson-Ihle Chevrolet, Inc., a Minnesota corporation doing business in El Monte under the name of Gunderson Chevrolet.

Republic Industries, Inc. wholly owned, operated and managed El Monte Motors, Inc., which sold new and used cars.

In November 1998, Gunderson-Ihle entered into an Asset Purchase Agreement with Republic and El Monte Motors for the sale of the Gunderson Chevrolet dealership and the Gunderson trade name. Pursuant to the Asset Purchase Agreement, Republic

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[1] Because this appeal involves a demurrer, we accept the allegations of the complaint as true. The facts recited here will then be subject to proof in later proceedings.

acquired the exclusive right to use the "Gunderson" and "Gunderson Chevrolet" trade names for three years.

At about the same time, *Gunderson* entered into a letter agreement with Republic stating as follows: "Reference is made to the Asset Purchase Agreement, dated the same date as this letter agreement, among you, Gunderson-Ihle Chevrolet . . . and the other companies and individuals named therein . . . ." Gunderson further stated: "I consent to and approve the Purchase Agreement and the transactions contemplated thereby" as a shareholder, director and officer of Gunderson-Ihle (and other entities not involved in this appeal). He set forth certain terms to which he agreed in these capacities in consideration of benefits under the Purchase Agreement.

"In addition, I acknowledge that the assets being sold under the Purchase Agreement include the right to use the trade name 'Gunderson' in connection with the auto businesses being sold, and the associated goodwill, and that you have agreed to limit your use rights as provided in Section 5.23 of the Agreement and as set out below.[2] You and *I* agree that, in consideration of the payments made under the Purchase Agreement and the covenants in this letter agreement, (1) you may use the 'Gunderson' trade name in connection with the dealership businesses you are acquiring under the Purchase Agreement for up to three years after the date of closing of each such purchase, respectively, and shall, if requested, cease making any use of the 'Gunderson' trade name in connection with such businesses at any time after such three-year period; and (2) I will not, during such three-year period or during the two years following such period, use or permit the use of the 'Gunderson' trade name in connection with any business located within 40 miles of either dealership, which business includes selling, leasing or servicing any new or used vehicles or in the wholesale or retail supply of parts with respect thereto,

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[2] The letter agreement and the subsequent amendment to this agreement were the only documents attached to the complaint and first amended complaint. Because the Asset Purchase Agreement is not a part of the record, we do not know whether Section 5.23 of the Agreement contains identical, similar or different limitations than those set forth in the letter agreement.

and (3) I may use the 'Gunderson' trade name in any business without restriction hereunder after the five-year period referred to above. Because of the character of these undertakings, the irreparable harm that would result from such a breach, and the inadequacy of money damages, we agree that these covenants may be enforced by injunctive relief and specific performance." The letter agreement was signed on behalf of Republic and by "Scott A. Gunderson" without any further qualification.

In February 1999, Gunderson-Ihle entered into a Trade Name License Agreement with Republic and El Monte Motors. At the same time, the Letter agreement between Gunderson, "an individual," and Republic was modified to delete the words "or during the two years following such [three-year] period" and specify that Gunderson could use the "Gunderson" name without restriction after three years (instead of five as originally provided).

In April 1999, Gunderson-Ihle assigned its residual rights in its trade names including "Gunderson" and "Gunderson Chevrolet" to Gunderson.

During the three years that Republic and El Monte Motors were authorized to use the Gunderson trade name, they engaged in conduct that "substantially, if not completely, destroyed the value of the Gunderson trade[]name.[3] This conduct included, but was not limited to, cheating customers, including hidden costs in sales contracts and lying about charges. This course of conduct gained widespread adverse public and media attentio[n] commencing in or around January 2001 and continuing to the present."

The California Department of Motor Vehicles filed charges against Republic resulting in a settlement adverse to the Gunderson trade name, including a temporary suspension of Gunderson Chevrolet's automobile dealer's license.

Well-publicized criminal charges were filed against Republic's employees. In February 2002, the Los Angeles Times reported that Republic's finance manager was

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[3] References to Republic from this point are meant to include El Monte Motors unless otherwise indicated.

convicted of conspiring to defraud Gunderson Chevrolet customers for which he was sentenced to three months in jail and five months probation.

In April 2002, the Los Angeles Times reported that Republic's general manager at Gunderson Chevrolet (James Michael Hoban) was convicted of making untrue and misleading statements for which he was sentenced to six months in jail and five years probation; he was also ordered to pay a fine and perform community service.[4]

Republic's actions caused the Gunderson trade name to be associated with fraud and illegal activity in the car dealership business and caused Gunderson, still in the auto dealership business, substantial damage exceeding $9 million.

In February 2003, Gunderson filed a complaint against Republic asserting breach of contract, breach of the implied covenant of good faith and fair dealing, negligence and fraud based on the allegations set forth above. As to the breach of the implied covenant of good faith and fair dealing cause of action, the trial court was inclined to sustain the demurrer without leave to amend because Gunderson had failed to allege and could not allege a "special relationship." Ultimately, however, the court sustained Republic's demurrer to each cause of the four causes of action with leave to amend. Gunderson then filed a first amended complaint asserting a single cause of action for breach of contract on the grounds that Republic had operated the Gunderson Chevrolet dealerships in an unreasonable and bad faith manner in contravention of the letter agreement and covenant

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[4] The same article reported that the dealership's finance director (Michele Davis) was convicted of conspiracy to make untrue or misleading statements in the sale of automobiles (for which she was sentenced to six months in jail and five years probation); the used car manager (Randolph Samuel Cooper) was convicted of making untrue or misleading statements in the sale of a car (for which he was fined and sentenced to three years probation); another finance manager with the dealership (Donald Poteete) was convicted of conspiracy to defraud (for which he was sentenced to a suspended three-year prison term and a six-month jail term and ordered to pay a fine and perform community service). Two other Gunderson Chevrolet employees (Ronald Crumer and Hamid Ghanian) were awaiting trial as of May 2002.

of good faith and fair dealing implied in that agreement so as destroy the goodwill and value associated with the Gunderson trade name.

When Republic filed another demurrer, the trial court sustained it without leave to amend because the court determined that the letter agreement imposed no obligation on Republic not to injure the Gunderson trade name. "Furthermore, [Gunderson] cannot rely on the covenant of good faith to constitute [his] only cause of action for breach of contract. The covenant cannot exist independently from the contract, and the covenant cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." The trial court then entered a judgment of dismissal and this appeal followed.

DISCUSSION

I. The Trial Court Erred in Sustaining Republic's Demurrer Without Leave to Amend.

As a "threshold" matter, Republic contends that the trial court's ruling should be upheld because Gunderson did not plead that he had any rights under the Asset Purchase Agreement and Republic had no obligations to Gunderson under the letter agreement. "Notably, the side letter did not suggest that . . . Gunderson had any rights to the Gunderson names; nor did it rest on any additional consideration specific to . . . Gunderson." Further, "the letter contains no promises running from Republic . . . to . . . Gunderson personally." We find that none of these arguments is established as a matter of law so as to support the trial court's ruling on demurrer.

As already noted, Gunderson premises his complaint on breach of the letter agreement only. However, the letter agreement itself specifically references the Asset Purchase Agreement "dated the same date as this letter agreement," evidencing their apparent relationship to one another and at least suggesting that Gunderson's individual agreement was required with respect to the use of the "Gunderson" trade name.

According to the first amended complaint, under the Asset Purchase Agreement, Republic acquired the rights to use the "Gunderson" as well as the "Gunderson Chevrolet" trade names while the letter agreement with Gunderson only relates to the "Gunderson" name (obviously also Gunderson's own last name) alone.

On its face, the letter agreement signed by Republic as well as "Scott A. Gunderson" (without further qualification) recites that *Gunderson* agrees to allow Republic to use the "Gunderson" trade name for three years (pursuant to the amendment) and within 40 miles of either of two dealerships sold to Republic while *he* agrees not to "use or permit the use" of the "Gunderson" trade name within those boundaries; the agreement further recites that, after the three-year period, Gunderson had the right to use the name without restriction. The agreement recites that the payments under the Asset Purchase Agreement as well as the covenants of the letter agreement served as the consideration for the letter agreement.

The amendment to the letter agreement, also signed by Republic, specifically states that it is entered into "by and between Scott Gunderson, *an individual*," but also expressly states that the only changes to the letter agreement involve the change from a five-year period to a three-year period—reiterating that the agreement and its amendment are between Republic and Gunderson individually. The suggestion is that Gunderson did possess the right to his own last name as a trade name (whether it was an exclusive right or along with the Gunderson-Ihle corporation) and Republic agreed to abide by the terms he specified for its use.[5] All of these matters will be subject to proof in the future but do not support the sustaining of the demurrer without leave to amend.

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[5] At the first demurrer hearing, when the trial court raised the question of whether the Gunderson-Ihle corporation had the "dog in the fight," his counsel specifically represented: "No. The actual owner of the trade name is indeed the individual Scott Gunderson."

II. Gunderson Stated a Cause of Action for Breach of the Implied Covenant of Good Faith and Fair Dealing.[6]

In *Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342 (*Carma*), our Supreme Court considered the scope of the covenant of good faith and fair dealing. "*Every* contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." (*Carma, supra,* 2 Cal.4th at p. 371, italics added, citations and internal quotations omitted; see also *Cates Construction, Inc. v. Talbot Partners* (1999) 21 Cal.4th 28, 43, italics added, citations omitted ["By now it is well established that a covenant of good faith and fair dealing is implicit in *every* contract"].) "The covenant of good faith finds particular application in situations where one party is invested with a discretionary power affecting the rights of another. Such power must be exercised in good faith. . . . However, defining what is required by this covenant has not always proven an easy task." (*Carma, supra,* 2 Cal.4th at p. 371, citations omitted.)

"Notwithstanding the difficulty in devising a rule of all-encompassing generality, a few principles have emerged in the decisions. To begin with, breach of a specific provision of the contract is not a necessary prerequisite. . . . Were it otherwise, the covenant would have no practical meaning, for any breach thereof would necessarily involve breach of some other term of the contract." (*Carma, supra,* 2 Cal.4th at p. 373.)

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[6] The bulk of Gunderson's substantive argument is taken verbatim from *Third Story Music, Inc. v. Waits* (1995) 41 Cal.App.4th 798, 804-807, without quotation or attribution of any sort. The case is not even cited in his opening or reply brief. Such a lack of candor with the court and the opposing party is repugnant. Moreover, there is a conspicuous omission of text that counsel apparently found problematic. Counsel's job is to distinguish such authority, not to pass off the useful portions of it as his own and hope that no one discovers where they came from. (The *Third Story Music* case is in fact distinguishable as it involved a provision expressly authorizing conduct the implied covenant of good faith could not be used to contradict.)

Further, the covenant of good faith can be breached for objectively unreasonable conduct, regardless of the actor's motive." (*Ibid.*)

"It is universally recognized the scope of conduct prohibited by the covenant of good faith is circumscribed by the purposes and express terms of the contract. [Citations.] [U]nder traditional contract principles, the implied covenant of good faith is read into contracts 'in order *to protect the express covenants or promises of the contract*, not to protect some general public policy interest not directly tied to the contract's purpose.'" (*Carma, supra,* 2 Cal.4th at p. 373, italics added, citation omitted.) "The covenant of good faith and fair dealing . . . is aimed at *making effective* the agreement's promises." (*Carma, supra,* 2 Cal.4th at p. 373, fn. 13, italics added, citation and internal quotations omitted.)

"It is of course a simple matter to determine whether given conduct is within the bounds of a contract's express terms. For this it is enough that the conduct is either expressly permitted or at least not prohibited. Difficulty arises in deciding whether such conduct, *though not prohibited*, *is nevertheless contrary to the contract's purposes and the parties' legitimate expectations*." (*Carma, supra,* 2 Cal.4th at p. 373, italics added.)

Here, although Republic was permitted to "use" the "Gunderson" trade name for a specified term and over a particular area without any particular restriction, it was not expressly authorized to engage in criminal activity under the "Gunderson" name pursuant to the letter agreement. Though misrepresentation, fraud and criminal conduct are not expressly prohibited by the agreement's terms, such conduct is "nevertheless contrary to the contract's purposes and the parties' legitimate expectations" where the agreement contemplates Gunderson's simultaneous use of the "Gunderson" trade name outside the 40-mile boundaries of each dealership sold to Republic and his exclusive use of the name after the three-year agreement term. (*Carma, supra,* 2 Cal.4th at p. 373.) "The essence of the implied covenant is that neither party to a contract will do anything to injure the right of the other to receive the benefits of the contract. . . ." (*Cates Construction, Inc. v. Talbot Partners, supra,* 21 Cal.4th at p. 43, italics added, citations omitted.) To read the

agreement to allow Republic discretion unlimited by the covenant of good faith and fair dealing to use the "Gunderson" name for criminal purposes and thus destroy its value is to deprive Gunderson of his right to receive the benefits of the letter agreement in attempting to do business under the same name at the same time as Republic and thereafter.

DISPOSITION

The judgment is reversed and the matter is remanded to the trial court with directions to overrule the demurrer to the first amended complaint. Each side is to bear its own costs on appeal.

WOODS, J.

We concur:

JOHNSON, Acting P.J.

ZELON, J.